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Opinion following remand from Supreme Court

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OPINION ON REMAND FROM THE CALIFORNIA SUPREME COURT

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MARILYN KAYE FREEMAN , Defendant and Appellant.	D046394 (Super. Ct. No. SCD171601)
In re MARILYN KAYE FREEMAN on Habeas Corpus.	D049238 (Super. Ct. No. SCD171601)

Consolidated appeal from a judgment of the Superior Court, Robert F. O'Neill, Judge, and petition for writ of habeas corpus. Judgment affirmed, petition denied.

Marilyn Freeman challenges a judgment convicting her of solicitation to commit kidnapping, residential burglary, two counts of stalking, and misdemeanor child endangerment and battery. The offenses arose from Freeman's assaultive conduct

towards her teenage daughter and actions Freeman took against her daughter's foster parents.

This case is currently before us on remand from the California Supreme Court. In our original opinion, we concluded the judgment should be reversed on constitutional grounds because of the appearance of judicial bias concerning the judge who presided over Freeman's trial. Reversing our decision, the California Supreme Court clarified the standard applicable to constitutional judicial bias challenges, and found there was no judicial bias in Freeman's case meeting this standard. (*People v. Freeman* (2010) 47 Cal.4th 993, 1005-1006.)

In our original opinion, apart from the judicial bias issue, we resolved Freeman's contentions that the trial court erred in denying her three motions for acquittal and that she could not properly be charged with solicitation to commit kidnapping. These holdings were unaffected by the California Supreme Court's decision, and were not otherwise challenged. However, in our original opinion we did not resolve several contentions raised in the appeal concerning instructional and evidentiary error. Having received the case back from our high court, we now address the issues left unresolved in our original opinion, and we incorporate our original analyses of the issues already resolved.[1]

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1 Both the resolved and outstanding issues were fully briefed at the time of the original appeal. On remand from the California Supreme Court, we notified the parties that we would be submitting the case for resolution. The parties did not request permission to file supplemental briefing after remand from the Supreme Court. (See Cal. Rules of Court, rules 8.200, 8.256(d)(2), 8.532(b).)

As to the stalking convictions, Freeman argues the trial court erred in (1) denying her motion for acquittal, and (2) refusing her request for amplification of the stalking instructions. Regarding the residential burglary conviction, she asserts the court erroneously denied her motion for acquittal. As to the solicitation to commit kidnapping conviction, she contends (1) she could not properly be charged with solicitation to commit kidnapping because the child abduction statute has a preemptive effect; (2) the trial court erred in denying her motion for acquittal; and (3) the court erred in refusing her request for an instruction regarding the defense of consent. Finally, as to the misdemeanor child endangerment and battery offenses, Freeman argues the trial court erred in admitting pretrial statements made by her daughter under the spontaneous declaration exception to the hearsay rule. Finding no prejudicial error, we reject these arguments and affirm the judgment.

In addition to the appeal filed by Freeman's appointed appellate counsel, Freeman filed an in pro. per. petition for writ of habeas corpus contending her appellate counsel provided ineffective assistance of counsel. We did not resolve this petition on the merits at the time of our original opinion. We now do so, and deny the petition.[2]

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2 In conjunction with the original appeal, Freeman's counsel also filed a petition for writ of habeas corpus challenging her residential burglary conviction. We denied this writ petition on the merits (*In Re Freeman* (Feb. 5, 2007, D048111) [nonpub. opn.]), and this denial was not affected (or vacated) by the California Supreme Court's decision. (See fn. 10, *post*.)

FACTUAL AND PROCEDURAL BACKGROUND

In accord with our standard of review on appeal, we summarize the facts in the manner most favorable to the judgment. (*People v. Dayan* (1995) 34 Cal.App.4th 707, 709.)

Child Endangerment and Battery

On the afternoon of September 10, 2002, Freeman's daughter, E., called 911 reporting that Freeman had hit her and thrown her against walls, such incidents had been happening all her life, and recently the frequency of the incidents had been increasing. E. explained that her mother home-schooled her and would lock her in the trailer where they resided. E. stated that about one hour earlier, her mother "grabbed [E.'s] head, . . . beat [it] against the wall and . . . hit . . . and yelled at [E.] . . . " E. was crying and afraid that when her mother returned home, "it [was going] to be even worse." E. told the dispatcher she had called her aunt and her aunt advised her to call 911.

About 50 minutes after the 911 call, Deputy Sheriff Margaret Barone spoke to E. on the phone. E. sounded very upset and frightened. About 15 minutes later, Deputy Barone arrived at E.'s residence. E. appeared terrified; her voice was cracking and her hands were shaking. Deputy Barone observed large welts on E.'s thigh and calf, bruising on her hip, and minor scratches on her arm. E. complained of pain to her forehead and shoulder.

E. told Deputy Barone that when she was sleeping on the couch that day, Freeman screamed and yelled at her to get up. Freeman kneed E. and started hitting and kicking her. During the struggle Freeman pushed E. and E.'s forehead hit the wall. When E.

landed on the floor, her mother continued to kick her. E. managed to shove her mother off her; E. then ran out of the trailer and hid behind some bins. E. heard Freeman drive away, and then quickly drive back. Freeman yelled at E. to come out, but E. was too afraid. E. peeked around a corner of the bins and was terrified of the look on her mother's face.

E. told Deputy Barone that she first recalled being hit by her mother when she was three years old and she remembered the police being summoned about seven years ago. She stated the abuse had become progressively worse during the past year and had been almost a daily occurrence during the past six months. E. was concerned about what was going to happen when her mother returned home. Based on E.'s injuries, the potential for violence when Freeman returned, and E.'s level of fear, Deputy Barone took E. into protective custody. Deputy Barone expedited their departure without gathering any of E.'s belongings because E. was fearful and in a rush to leave. As they drove away E. crouched down on the floor of the police vehicle, stating she did not want her mother to see her.

E. was taken to Green Oaks Ranch, a temporary placement facility. Nurse practitioner Lorrie York observed bruises on E.'s hip, thigh, and calf, and scratches on her back, arm and leg.

Foster Home Placement

On September 17, 2002, Child Protective Services (CPS) placed E. in the home of foster parents Vanessa Franco and Diana Gonzalez. Typically, a parent who is permitted unsupervised visitation is given the foster parents' phone number to arrange visitation.

However, because of the protective issues, E.'s placement was confidential and Freeman was not given the foster parents' phone number. Franco was told that Freeman could have contact only with the social worker, and the social worker would convey any necessary information about E. to Franco.

When Franco met E., E. was very fearful and intimidated by everything around her. As Franco and E. were driving to eat lunch on the day of their first meeting, E. sank very low in her seat, almost to the floorboards, so that her head could not be seen above the window. Franco tried to reassure E. that her mother was not following her. While living in Franco's home, Franco described E. as suffering from "a beaten dog syndrome" and noted she would jump if she heard a loud noise and would flinch if spoken to in a high tone of voice. E. told Gonzalez and Franco that her mother had physically assaulted and tormented her for years, including kicking her, chasing her with a knife, pushing her into a brick wall, putting feces on her hairbrush, and threatening to kill her and make it look like suicide. E. stated her mother had also threatened other people with guns.

Solicitation to Commit Kidnapping

On September 3, 2002, Kimberly Oakley, who was contemplating divorce, hired Freeman, who is an attorney, to represent her. When Oakley next spoke with Freeman on September 15, 2002, Freeman seemed different. Contrary to her behavior at their first meeting, Freeman now rambled and failed to respond to Oakley's divorce-related questions. Freeman told Oakley that her daughter had been unjustly removed by CPS, and that she was desperately trying to locate E.'s foster home. Freeman explained that she was concerned for her daughter because of her daughter's undiagnosed schizophrenia.

Oakley, who had a daughter with a drug addiction problem in a residential treatment program, was sympathetic. Thereafter, Freeman frequently called Oakley to "unload" about the situation, and Oakley offered to help Freeman.

During one of these conversations in September 2002, Freeman told Oakley that E. and her foster family were attending Calvary Chapel in Escondido, which was the same church Oakley attended. According to Oakley, Freeman repeatedly pressed her to speak to the Calvary Chapel youth pastor to find out information about E.

In early October 2002, Freeman told Oakley that she had "a couple of plans" to "steal" E. from the foster family and stated she always carried large sums of cash with her so she could take E. across the Canadian or Mexican border. Freeman told Oakley that one option she had contemplated was the use of an "escort" from a residential drug treatment program to take E. Oakley explained to Freeman that this service, which was used to remove combative, uncooperative teens from their homes, could not be used to take E. from the foster family, but Freeman did not appear to understand this.

Freeman also repeatedly asked Oakley to "steal" E. from the foster family, stating she had a couple of ideas how to accomplish this. Freeman suggested a plan where Freeman would wait in the car and Oakley would try to lure E. out of the foster home by telling E. how much Freeman loved her. Freeman was sure E. would come over and see Freeman in the car, and then Freeman could "'take off'" with her. Freeman also proposed that Oakley go to E.'s YMCA after-school program while Freeman waited in the car. Freeman opined that when Oakley told E. how much her mother loved and missed her, E. would agree to walk over to Freeman's car; then Freeman "'would take [E.] and get her in

the car and take off for the Canadian border or the Mexican border.'" Oakley refused Freeman's requests to carry out these plans. When Oakley refused, Freeman was angry with Oakley and told her she had another friend who she would ask to take E.

In late October, notwithstanding Oakley's previous refusals, Freeman continued to press Oakley to help her get E. Freeman told Oakley she "'really need[ed]'" Oakley's help and pointed out that it would be easy for Oakley to hide E. at Oakley's rural, gated home. Oakley continued to refuse her requests, telling Freeman her idea to take E. was "absolutely ludicrous."

October 11 Residential Burglary

Around 2:00 or 3:00 p.m. on October 11, 2002, Freeman called Oakley and told her she had broken into the office of the high school E. was attending and located E.'s foster home address on the school's computer system. Freeman related that she had been spying on the foster family for "quite some time" and she was upset about the way they were handling E. Freeman told Oakley she would rent various cars and disguise herself in different outfits; she watched the foster family from the parking lot in their apartment complex; and she followed them when they went places.

At about 8:30 p.m. on October 11, 2002, Freeman again called Oakley. Freeman was hysterical because E. had not returned to the foster parents' home. Freeman explained that she was concerned for her daughter's safety because she had been watching the apartment for a good part of the day; E. had not returned home at her typical time; and E. still had not returned home. Freeman begged Oakley to go with her to watch the apartment. Freeman stated E. needed medication; no one had diagnosed E. with

schizophrenia; no one could handle E. correctly; and E.'s life was being jeopardized. Oakley felt sorry for Freeman and agreed to accompany her.

Around 9:30 p.m., Freeman picked up Oakley at Oakley's residence. Freeman drove at a dangerously fast speed to the complex; she was hysterical and screeching that her daughter was in danger and she had to get her daughter away from the foster parents. Freeman told Oakley that she had spent several nights and days in the parking lot watching her daughter and the foster parents, and that she had tried that day to break into the foster parents' apartment.

Freeman and Oakley watched the apartment for about two hours, and it did not appear that anyone was at home. Oakley told Freeman it was time to leave, and tried to reassure Freeman that her daughter was all right. Freeman insisted she needed to "'find out what's going on here'" and she had to see if E. was "'okay.'" Freeman left the vehicle and went to a mini-mart where she bought a flashlight and batteries. After Freeman returned to the car and Oakley again tried to persuade her that they should leave and her daughter was fine, Freeman got out of the car and said, "'I don't care. Why should I take this anymore?'" Freeman got the flashlight and a camera and told Oakley she was going inside the foster parents' apartment.

Oakley followed Freeman and tried to dissuade her from entering the apartment. Oakley saw Freeman go over a back wall and enter the apartment through a sliding glass door that had apparently been left open. Oakley saw the camera's flash go off several times and heard drawers being opened and closed. Freeman was in the apartment for about seven or eight minutes. When she returned, Freeman was in a manic-type state.

She appeared elated that she had taken pictures; told Oakley that the foster mothers slept together; and stated she had found an address book although she did not have the book with her. Freeman appeared content that she had obtained what she had thought she would get in the apartment, and they left.

On October 12, 2002, Gonzalez noticed that their front door lock had been tampered with, but she did not notice any other disturbance at their apartment. About one month later, Franco and Gonzalez were informed that Freeman may have broken into their apartment.

Stalking: October 19 Incident

Franco and Gonzalez first became aware that someone was following them on October 19, 2002. On this occasion, Franco and Gonzalez drove with E. and their other foster daughter to Los Angeles to visit Franco's grandmother. They first stopped at Franco's mother's home in Oceanside, and then started their trip north at about 9:30 or 10:00 p.m. As Franco was driving on the freeway to her grandmother's house, she noticed a vehicle that seemed to have been following too closely behind her for some time. Franco changed her driving to see if the vehicle would pass them (i.e., slowing down, changing lanes), but the vehicle stayed behind them no matter what she did. Franco tried to lose the vehicle by accelerating to about 75 or 80 miles per hour and changing lanes, but the vehicle continued to follow them. The driver of the vehicle that was following them made several dangerous maneuvers to keep up with Franco, including cutting off vehicles in other lanes and driving within inches of Franco's back

bumper. At one point Franco accelerated to 95 miles per hour in her unsuccessful attempts to evade the vehicle.

After the vehicle had been following them for about one-half hour and Franco saw that traffic up ahead was congested, Franco decided to exit the freeway to try to lose the vehicle. The vehicle followed her off the freeway, and at one point its headlights were turned off while it continued to follow them. Franco drove about 40 miles per hour on the surface streets trying to get away from the vehicle, and accidentally ended up on a dark, dead-end residential street with the vehicle still behind her. As Franco turned around in a driveway, the other vehicle stopped across the street with its headlights still turned off. Franco drove back to the freeway at a speed of about 45 to 50 miles per hour, with the vehicle still following her. Once on the freeway, the driver of the pursuing vehicle continued to drive with the lights off. Franco finally managed to lose the vehicle by quickly cutting across traffic lanes and exiting on a left-side off-ramp.

During the incident, Franco was in a "complete panic" and her heart was pounding "a hundred miles a minute." Gonzalez was "[f]rightened to death." The two children were screaming hysterically in the back seat. Because of the speeds she was driving while trying to evade the car, Franco feared for the safety of the occupants of her car and other cars, but explained she was in "survival mode" and could think only of "get[ting] away."

Franco estimated that the entire incident lasted for about one hour. Gonzalez observed that the vehicle following them was a dark grayish-blue Ford Windstar minivan. At one point when the van was beside Franco's car, Gonzalez saw that the driver was

light-skinned, heavyset, and appeared to be wearing a disguise, including a wig, dark glasses, and a mustache. During the incident, E. stated the driver was probably her mother who was "trying to get her."

Freeman admitted to Oakley that she had followed the foster parents on a Los Angeles freeway. Freeman told Oakley she had rented a car, dressed up in alternate clothing hoping the foster family would not recognize her, followed the family to a residence in Oceanside, and then chased them into the Los Angeles area. Freeman was "really proud" that she had chased them, and told Oakley she was glad that she "really shook them up" and "really scared them." Freeman stated she stared at them and gave one of the foster mothers a dirty look when she was driving beside her.

October 23 Incident

On October 23, 2002, another incident occurred. Around 10:15 p.m., while Gonzalez was driving with E. from Franco's mother's residence to their home, Gonzalez noticed that a gold Ford Explorer was following them. The vehicle continued to follow Gonzalez as she tried to evade it. Rather than going home, Gonzalez turned on a street, pulled over, and waited 10 minutes. She did not see the Ford Explorer, so she drove to their apartment. As they were walking towards their apartment, E. saw the gold Ford Explorer coming into the parking entrance of the complex. Gonzalez did not think it was safe to go to their apartment, so she and E. returned to their car. The Ford Explorer then turned around to leave the complex. Gonzalez, wanting to know who was following them, followed the Ford Explorer and had E. write down the license plate number, and the estimated year, make, and model of the vehicle. Gonzalez drove up next to the Ford

Explorer when traffic slowed because of an accident. The driver tried to cover her face, but E. began crying and screaming, "That's my mother. How could she do this to me?" E. put her seat back so that she could not see Freeman. Gonzalez looked over at Freeman, and Freeman looked at Gonzalez "in this evil manner" as if she wanted to hurt Gonzalez.

Gonzalez did not return home, but drove to Franco's mother's house. When they arrived at Franco's mother's home, Gonzalez was hyperventilating and crying and E. was crying hysterically. At this point, Franco and Gonzalez called the police and CPS. Because of the incident, the next day Gonzalez stayed home from work and E. did not go to school, and E. had an emergency session with her therapist. Franco and Gonzalez changed the locks on their door, put extra locks on the sliding doors and windows, and got a private mail box.

November 3 Incident

On November 3, 2002, between 6:00 and 7:00 p.m., Gonzalez noticed a white Ford Windstar van with tinted windows parked directly across from their apartment. Gonzalez told E. to stay in the apartment. Gonzalez grabbed her phone and stepped outside to see if anyone was in the van. She saw a head moving in the back of the van, but she could not see enough to identify the person. When she returned to her apartment, the van sped off. In spite of the extra security measures at her apartment, Gonzalez still felt frightened.

In early November 2002, during one of Oakley's meetings with Freeman, Oakley saw that Freeman was driving a white minivan. Freeman told Oakley that she had rented the minivan and that it was one of the cars she had been using to spy on the foster family.

Perfume Incidents

On one occasion, Freeman sent E. a filthy jacket that smelled like Tea Rose perfume. On another occasion, after Gonzalez left her car unlocked while picking E. up from school, the car smelled like Tea Rose perfume. E. told Gonzalez that the perfume smelled like her mother's perfume. Gonzalez felt scared, thinking that Freeman would "go to any extent to do something to [Gonzalez]." Freeman told Oakley that she had doused the jacket and sprayed the foster parents' car with her perfume because she wanted her daughter to smell her presence.

Oakley's Reporting of Freeman to CPS on November 10

On November 8, 2002, Freeman called Oakley. Freeman was crying and hysterical and threatening to kill herself. Freeman told Oakley that she had a lot of work to do in E.'s dependency case and that to win her case she had to prove E. was incompetent. Freeman asked Oakley to go with her to the law library to help her sift through the information. Oakley agreed to help Freeman in exchange for a reduction in Freeman's fees.

On November 9, 2002, Oakley accompanied Freeman to the law library. During this meeting, Freeman's mood shifted at different times from elated and happy to sullen and angry. Freeman "threw a ton of papers" from E.'s dependency case in front of Oakley and told her to read them. As Oakley started reading the papers depicting the

reasons E. had been removed from Freeman's custody, Oakley realized that Freeman was "a complete con artist, that nothing she had ever told [Oakley] was ever true about her daughter." When Oakley questioned Freeman about the allegations in the dependency reports, Freeman acknowledged that she "vaguely remembered" hitting E. on the hips and slamming E. into a wall; that she was holding a knife during one of the reported incidents; and that she pretended to wipe a piece of toilet paper with feces on it on E.'s hair brush. When Oakley suggested that Freeman admit to some of the allegations and get counseling, Freeman became angry, stating that she could lose her law license and that she had to prove E. was incompetent.

On November 10, 2002, Oakley called CPS to advise E.'s social worker that she was concerned for E.'s safety. On November 14, 2002, E. was removed from Franco and Gonzalez's foster home.

On December 6, 2002, the police searched Freeman's residence and car. The police developed rolls of film found in Freeman's residence, and showed the photographs to Gonzalez and Franco. The photographs depict Gonzalez, the open front door of Franco's and Gonzalez's residence, their other foster daughter, Franco's place of employment and car, and Franco's mother's residence and car.

Foster Parents' Reactions to the Stalking

Because of the stalking incidents, Gonzalez and Franco felt their life was completely changed. They felt fearful and constantly on guard. Gonzalez had trouble sleeping and had nightmares. Franco felt vulnerable, helpless, and "completely violated." She was also concerned for the safety of her mother and other family members. During

the time when they did not know who was following them, Franco was frightened because she had no idea what the person's intentions were. Once the stalker was identified as Freeman, Franco was frightened because she did not know what Freeman was capable of, particularly given E.'s accounts of her mother's previous violent behavior.

Jury Verdict and Sentence

The jury convicted Freeman of two counts of stalking (one count per foster parent); residential burglary; solicitation to commit kidnapping; and misdemeanor child endangerment and battery of E. She received a six-year sentence.

DISCUSSION

I. *Stalking*

A. *Motion for Acquittal of Stalking*

Freeman argues the trial court erred at the close of the prosecution's case-in-chief in denying her Penal Code[3] section 1118.1 motion for acquittal of the two stalking counts (one involving Franco and the other involving Gonzalez).

A trial court's evaluation of a motion for acquittal is governed by the same substantial evidence test used in an appellate challenge to the sufficiency of the evidence, i.e., the trial court determines "whether from the evidence then in the record, including reasonable inferences to be drawn therefrom, there is substantial evidence of every element of the offense charged." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 89.) If the record can reasonably support a finding of guilt, a motion for acquittal must

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3 Subsequent statutory references are to the Penal Code unless otherwise specified.

be denied even if the record might also justify a contrary finding. (See *People v. Holt* (1997) 15 Cal.4th 619, 668.)

At the time Freeman engaged in the alleged offenses, the crime of stalking was defined as committed by "[a]ny person who willfully, maliciously, and repeatedly follows or harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family . . . ." (Former § 646.9, subd. (a).)[4] The elements of the stalking offense are (1) repeatedly following or harassing another person, (2) making a credible threat, (3) intent to place the person in reasonable fear for the safety of the person or his or her family, and (4) causing actual fear. (See *People v. Norman* (1999) 75 Cal.App.4th 1234, 1239; *People v. Carron* (1995) 37 Cal.App.4th 1230, 1238-1239.)

Section 646.9, subdivision (e) defined harassment as "a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose. This course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person." Course of conduct was defined as "a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of 'course of conduct.'" (§ 646.9, subd. (f).) A credible

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4 After Freeman's commission of the offenses in 2002, the language of section 646.9 was amended effective January 2003. (49 West's Ann. Pen. Code (2010 Supp.) § 646.9, pp. 110-111.) Subsequent references to section 646.9 are to the former version effective in 2002.

threat was defined as a verbal or written threat, or a threat "implied by a pattern of conduct" made with the intent to place the victim in reasonable fear for his or her safety or the safety of his or her family and made with the apparent ability to carry out the threat so as to cause such fear. (§ 646.9, subd. (g).) The fear suffered by the victim need not be experienced simultaneously with the commission of the act designed to generate the fear; thus, stalking is committed even when the victim learns of the defendant's conduct some time after its occurrence. (*People v. Norman, supra,* 75 Cal.App.4th at pp. 1238-1241.)

Freeman argues: (1) her conduct of following E.'s foster parents served the legitimate purpose of furthering her fundamental right to parent; (2) there was no evidence she issued a credible threat with the intent to cause fear; and (3) there was no evidence that a reasonable person would have suffered substantial emotional distress or that the foster parents actually suffered such distress.

1. *Fundamental Right to Parent*

We agree that a parent has a fundamental right to parent, and also agree that if the record had shown as a matter of law that Freeman's conduct reflected a legitimate exercise of this right, the jury's verdict could not stand. However, Freeman's contention is belied by a record that provides ample evidence from which the jury could conclude that Freeman's conduct was inconsistent with efforts to assert parental rights or to merely monitor the well-being of her child while in foster care. Evidence was presented showing that Freeman engaged in conduct that did nothing to inform her about her daughter's well-being and that in some instances seriously threatened her daughter's safety. This included making plans to "steal" her daughter, breaching the confidentiality of the foster

placement, breaking into the foster parents' home when her daughter was not there, pursuing the foster parents and her daughter at dangerously high speeds on a Los Angeles freeway, turning off her vehicle lights while following them at night, following Gonzalez and her daughter on the San Diego streets and glaring at Gonzalez, spying on the foster parents at their residence and other places, and spraying Gonzalez's car with her perfume. When viewed in its totality, a jury could reasonably conclude Freeman's actions were unrelated to E.'s well-being, and did not serve the legitimate purpose of advancing Freeman's fundamental right to parent.

To support her argument that she should have been acquitted of the stalking charges based on the fundamental right to parent, Freeman asserts that no evidence was introduced showing that she was precluded by court order from contacting her daughter during the time period of her alleged criminal behavior. Regardless of whether a formal no-contact order had been entered, such an order was not dispositive on the issue of stalking. Even if Freeman was permitted contact with her daughter, a jury could reasonably conclude that the means Freeman chose to monitor her daughter's foster placement exceeded the legitimate exercise of parental rights.

2. *Credible Threat with Intent to Cause Fear*

Freeman argues that the evidence did not show a credible threat with intent to cause fear because she consistently tried to hide her identity and she was motivated by a concern for her daughter and a desire for reunification with her. Because intent is inherently difficult to prove by direct evidence, the trier of fact can properly infer intent

from the defendant's conduct and all the surrounding circumstances. (*People v. Edwards* (1992) 8 Cal.App.4th 1092, 1099.)

Regardless of Freeman's attempts to hide her identity and her expressed concerns for her daughter, the evidence shows she acted in a manner inconsistent with an intention to merely check on her daughter's welfare without frightening the foster parents. On October 19 Freeman engaged in a lengthy, dangerous pursuit on a Los Angeles freeway. Freeman told Oakley that she was "really proud" she had chased them on a Los Angeles freeway and glad she had "really scared" them during the ordeal. A few days later, on October 23, she again followed one of the foster parents in her vehicle and glared at the foster parent "in [an] evil manner." On November 3 Freeman stationed herself in a van by the foster parents' apartment and sped off after she was spotted by one of the foster parents. The foster parents ascertained that Freeman had sprayed perfume in their car. The foster parents were aware that Freeman had been resourceful enough to find their address even though the foster placement was confidential, and they were informed she had likely broken into their apartment.

Freeman's brazen burglary into the school to retrieve the foster parents' address from the computer, followed by her late night burglary into their residence, her reckless pursuit of them on a Los Angeles freeway, her glaring at Gonzalez when her identity was discovered, and her entry into Gonzalez's car to spray perfume, do not reflect surveillance conduct carried out with no intent to cause fear or no ability to carry out a threat. Further, the jury could reasonably consider that stalking by an unidentified person wearing a disguise can be even more ominous than stalking by an identified person, and that the

foster parents were in the frightening position of being unable to stop the surveillance as long as they could not provide a positive identification. The fact that Freeman may have believed she was acting out of concern for her daughter and as a means to reunify did not mean that the jury could not conclude she chose to advance her goals by intentionally terrifying the foster parents. Viewing the circumstances in their totality, the jury could reasonably conclude that Freeman intentionally imbued her conduct with a sinister tone, and that she engaged in conduct that would inevitably convey to the foster parents her ability and desire to go to great lengths to spy on them and frighten them. The evidence supports a finding that Freeman intended to, and did, communicate a credible threat with the intent to cause fear.

Freeman posits that to the extent her course of conduct showed she committed the "follow[ing] or harass[ing]" element of stalking, that same conduct cannot be used to establish the "credible threat" element of stalking. The argument is unavailing. The fact that the same conduct may overlap to establish more than one element of an offense does not defeat the sufficiency of the evidence to support each element. We are not persuaded by Freeman's suggestion that the Legislature intended to require distinct conduct to show harassment and a credible threat because it defined harassment as a "*course* of conduct" whereas it defined an implied credible threat as arising from a "*pattern* of conduct." (§ 646.9, subds. (e), (g), italics added.) When read in its entirety, it is clear that the different definitional subdivisions of section 646.9 merely elaborate on the required elements, which in essence require a harassing course of conduct accompanied by a credible threat, the latter which may be implied by a pattern of conduct. Indeed, in subdivision (f) of

section 646.9, the Legislature defined "*course* of conduct" for harassment as meaning a "*pattern* of conduct," thus using the two terms interchangeably. (Italics added.)

To support her assertion that there was no evidence she intended to place the foster parents in fear for their safety, Freeman notes that notwithstanding repeated opportunities to do so, she never issued an express verbal or written threat to them. The argument fails because the statute does not require an express threat; an implied threat from a pattern of conduct suffices.

3. *Substantial Emotional Distress Caused by Harassment*

There was also sufficient evidence for the jury to find that a reasonable person would have suffered substantial emotional distress from Freeman's stalking, and that the foster parents did in fact suffer substantial emotional distress. Substantial emotional distress within the meaning of the stalking statute means "something more than everyday mental distress or upset. . . . [T]he phrase . . . entails a serious invasion of the victim's mental tranquility." (*People v. Ewing* (1999) 76 Cal.App.4th 199, 210.) The foster parents first became aware they were being followed on October 19; they again knew they were being followed on October 23 and discovered Freeman's identity; and on November 3 they knew someone was watching their apartment. They described their extreme fear during a Los Angeles freeway pursuit, and their ever-increasing fear and distress as the stalking continued and they discovered their pursuer was E.'s mother. They knew that Freeman had succeeded in breaking through the confidentiality of the foster placement, and discovered she had likely entered their vehicle to spray perfume

and broken into their apartment. Franco testified she did not know what Freeman was capable of, particularly given her past behavior towards her daughter.

Contrary to Freeman's assertion, the fact that Franco and Gonzalez chose to be foster parents and to thereby take the risk of exposure to confrontations with disgruntled birth parents did not require the jury to find a foster parent would not reasonably experience substantial distress when subjected to the prolonged type of conduct that occurred here. The record contains a full description of the foster parents' fearful reaction to Freeman's conduct and its lingering deleterious effects on their well-being, including nightmares, loss of sleep, and a sense of helplessness and vulnerability. This evidence was sufficient to support a finding that a reasonable person would have suffered substantial emotional distress, and that the foster parents experienced this type of distress.

Freeman further maintains that it was E.'s unverified descriptions of her mother's previous assaultive behavior that caused the foster parents' fear, rather than the conduct committed by Freeman towards the foster parents. The jury was not required to reach this conclusion. As stated, Freeman engaged in stalking conduct that started with a reckless vehicular chase on the freeway, more vehicular following, glaring, spying at their residence, and spraying of perfume in their car. Later, the foster parents discovered she had taken pictures of them and even broken into their apartment. Although E.'s descriptions of her mother's behavior may have served to heighten the foster parents' fear, the record supports a finding that Freeman's stalking was itself a terrifying ordeal for the foster parents.

B. *Augmentation of Stalking Instructions*

The trial court instructed the jury concerning the offense of stalking in the language of CALJIC No. 9.16.1.[5] Freeman requested that the court augment the instruction to include a statement that the stalking offense does not extend to constitutionally protected activity. The court noted that the stalking statute (§ 646.9) included language excluding constitutionally protected activity, and granted the request.[6] Freeman requested that the court further amplify the instruction to state (1) that the right to travel is a constitutional right, and (2) that there is no reasonable expectation of privacy

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[5] The instruction stated in relevant part: "Every person who willfully, maliciously, and repeatedly follows or harasses another person, and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety or the safety of his or her immediate family, is guilty of a violation of Penal Code section 646.9, subdivision (a), a crime. [¶] 'Harasses' means a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose. This course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person. [¶] 'Course of conduct' means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. [¶] A 'credible threat' means a verbal or written threat, including that performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her family and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family . . . ."

[6] The augmentation given by the court stated: "Constitutionally protected activity is not included within the meaning of course of conduct. Constitutionally protected activity is not included within the meaning of credible threat." This language is derived from the current version of section 646.9, effective in 2003. The version effective in 2002 (when Freeman committed the offenses) included only the first reference to constitutionally protected activity (i.e., concerning course of conduct). (49 West's Ann. Pen. Code, *supra*, § 646.9, pp. 110-111.)

to not be photographed in a public place. The court denied the request, ruling that although Freeman could argue these points to the jury it was not appropriate to instruct on them. Freeman asserts the court erred in denying her request for additional amplification.

In appropriate circumstances a trial court may be required to give a requested instruction that pinpoints a defense theory of the case. (*People v. Bolden* (2002) 29 Cal.4th 515, 558.) However, a trial court should refuse instructions that are argumentative because they invite the jury to draw inferences favorable to one party from specified items of evidence. (*People v. Hughes* (2002) 27 Cal.4th 287, 361.) Instructions are argumentative if they focus "on the defendant's version of the facts, not his legal theory of the case . . . ." (*People v. Bonilla* (2007) 41 Cal.4th 313, 330.) "[I]nstructions that attempt to relate particular facts to a legal issue are generally objectionable as argumentative [citation], and the effect of certain facts on identified theories 'is best left to argument by counsel . . . .'" (*People v. Wharton* (1991) 53 Cal.3d 522, 570.)

The provision in section 646.9 excluding constitutionally protected activity from the reach of the statute is apparently designed to underscore that there is no culpability for activity that is within the bounds of permissible behavior in a free society. The defense theory that Freeman was merely engaging in permissible activity was pinpointed for the jury via the court's general instruction indicating that constitutionally protected activity was excluded. An amplification pointing out that traveling and taking photos in public is permissible activity was not essential for the jury's understanding of the defense

theory because it is well understood that this type of activity is, standing alone, not criminal.

It is also clear from the stalking statute that culpability will be imposed if, while engaging in otherwise permissible activity, the defendant acts with the intent to frighten and does in fact frighten another person. Although Freeman's requested augmentation was framed in general legal terms, the additional instructions set forth the specific type of conduct that she engaged in: traveling and photographing in public. Thus, Freeman's requested augmentation can be construed as focusing on her version of the facts rather than on her legal theory; i.e., implicitly urging the jury to find that she was merely traveling and taking pictures in public places with no threatening conduct. From this perspective, the augmented instructions were argumentative and the trial court was not required to give them.

In any event, assuming arguendo the additional instructions were not argumentative, there is no reasonable probability the outcome would have been more favorable to Freeman if the instructions had been given.[7] (See *People v. Friend* (2009) 47 Cal.4th 1, 42-43; *People v. Hughes* (2002) 27 Cal.4th 287, 362-363.) The instructions provided to the jurors informed them that engaging in constitutionally protected activity was not a violation of the stalking statute. Reasonable jurors would have understood that merely traveling and taking pictures in public, with no intent to frighten, constitutes

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[7] We note that, consistent with Freeman's augmentation request, the CALCRIM instruction for stalking includes a statement requiring the court to describe the type of constitutionally protected activity involved in the case. (CALCRIM No. 1301.)

constitutionally protected and/or permissible activity that is not a crime. There is no reasonable probability the jury's verdict on stalking was affected by the failure to spell out a person's right to travel and take pictures in public.

II. *Motion for Acquittal of Residential Burglary*

Freeman challenges the denial of her motion for acquittal on the residential burglary charge brought at the close of the prosecution's case. The prosecution's theory of the burglary charge was that Freeman intended to facilitate her stalking objective when she entered the residence, and the jury was instructed that stalking was the felony underlying the burglary charge.[8] Freeman argues there was no evidence she intended to commit a felony when she entered the foster parents' apartment, and thus she only committed trespass.

Burglary is committed when a person enters a house with the intent to commit theft or any felony. (§ 459.) The defendant need not intend to actually accomplish the felony in the residence; it is sufficient if the "entry is 'closely connected' with, and is made in order to facilitate, the intended crime." (*People v. Griffin* (2001) 90 Cal.App.4th 741, 749.) The intent to commit the felony may be inferred from all the facts and the circumstances of the case. (*People v. Kwok* (1998) 63 Cal.App.4th 1236, 1245.)

The evidence is sufficient for the jury to reasonably infer Freeman's entry into the foster parents' residence on October 11 was closely connected with and made to facilitate

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8 The jury was instructed: "Every person who enters a building with specific intent to commit stalking, a felony, is guilty of the crime of burglary . . . ."

her stalking of the foster parents. Prior to October 11, Freeman had already commenced her surveillance of the foster parents and she had formulated plans to remove E. from the foster placement without authorization. She had asked Oakley to press the Calvary Chapel youth pastor for information about E., and had repeatedly asked Oakley to help her "steal" E. from the foster family.[9] She had broken into the school to retrieve the foster parents' address from the computer and had been watching and following the foster parents for "quite some time." When Freeman exited the residence on October 11, she was elated that she had taken pictures and acquired information about the foster mothers.

From these circumstances, the jury could infer that Freeman entered the residence with a view to obtaining whatever information she could to advance her plan to interfere with the foster placement, which included intimidating the foster parents. Although the activity that first frightened the foster parents did not occur until after the October 11 entry into the apartment (when the foster parents detected they were being followed), the jury could reasonably infer that from the inception of her surveillance efforts in early October Freeman intended to engage in whatever was necessary to carry out her goal of disrupting the foster placement, including following and frightening the foster parents. Based on this inference, there was sufficient evidence to support a finding that Freeman entered the apartment to facilitate her plans to commit stalking by harassing and intimidating the foster parents.

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[9] Oakley testified that Freeman's requests that she help "steal" E. occurred both before and after October 11.

Freeman asserts the evidence shows her only intent when she entered the residence was to determine whether her daughter was safe. The jury was not required to draw this inference. Although Freeman told Oakley she wanted to know if her daughter was all right, Freeman entered the residence when it appeared her daughter was not at home. From this, the jury could infer Freeman knew she would not acquire any immediate information about her daughter's well-being, and that her intent was to try to get information to effectuate her plans to harass the foster parents. As noted, although Freeman's overall goals may have been to carry out what she thought was necessary to protect her daughter and to regain custody, this did not preclude an inference that she intended to unlawfully stalk the foster parents to accomplish her goals.

Given the sufficiency of the evidence to support entry with the intent to commit stalking, we need not discuss Freeman's contention that the evidence was insufficient to show she intended to commit theft when she entered the residence.[10]

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10 We note that Freeman's argument pertaining to intent to commit theft does not correlate with the manner in which the case was presented to the jury. When arguing the motion for acquittal of the burglary charge, Freeman's trial counsel asserted that "obviously, there [was] no theft" underlying the burglary. An intent to commit theft theory was never presented to the jury, and the jury was expressly instructed that the intended felony underlying the burglary charge was stalking. In denying Freeman's motion for acquittal on the burglary charge, the trial court noted that some information may have been retrieved from the residence, but the court did not state that theft was the underlying intended felony.

Freeman also relied on an intent to commit theft theory to challenge her residential burglary conviction in a petition for writ of habeas corpus filed at the time of her original appeal in this case. We summarily denied this writ petition. (*In re Freeman, supra,* D048111.)

III. *Solicitation to Commit Kidnapping*

A. *Propriety of Solicitation to Commit Kidnapping Charge*

Freeman argues she could not properly be charged with solicitation to commit kidnapping because the more specific statute of child abduction applies to the facts of this case.

Freeman was charged with a violation of section 653f, subdivision (a), which makes it a crime to solicit another person to commit or join in the commission of certain specifically enumerated crimes, including kidnapping, and with the intent that the offense be committed. Kidnapping is defined in section 207, subdivision (a) as the taking and carrying away of a person by force or fear. Child abduction is defined in section 278 as the malicious taking of a child by a person not having a right to custody with the intent to detain or conceal the child from the lawful custodian. Child abduction is not one of the crimes enumerated in the section 653f solicitation statute.

Generally, a defendant may not be prosecuted under a general statute when the Legislature intends that a more specific statute with a less severe penalty govern the proscribed conduct. (*People v. Jenkins* (1980) 28 Cal.3d 494, 501-506; *Mitchell v. Superior Court* (1989) 49 Cal.3d 1230, 1250; *People v. Jones* (2003) 108 Cal.App.4th 455, 463.) This "special over the general" preemption rule applies when (1) each element of the general statute corresponds to an element of the specific statute, or (2) "it appears from the statutory context that a violation of the special statute will necessarily or commonly result in a violation of the general statute." (*People v. Watson* (1981) 30 Cal.3d 290, 295-296; *People v. Coronado* (1995) 12 Cal.4th 145, 153-154.) This rule is

designed to ascertain and carry out legislative intent, and the enactment of "a specific statute covering much the same ground as a more general law" typically reflects an intent that only the specific provision apply. (*People v. Jenkins*, *supra*, 28 Cal.3d at p. 505.)

Freeman's contention that the child abduction statute precludes prosecution for solicitation to commit kidnapping is misplaced. The two statutes do not govern the same conduct because the solicitation statute does not include child abduction in the list of enumerated crimes for which solicitation culpability may be imposed, and the child abduction statute does not cover solicitation activity. Freeman could not be charged with solicitation to commit child abduction because there is no such offense in the California Penal Code, and she could not be charged with child abduction because E. was not taken. Thus, it is not possible that the Legislature intended solicitation to kidnap a child to be governed by the child abduction statute, because the child abduction statute does not extend to solicitation activity and the solicitation statute does not extend to child abduction. Freeman's argument premised on the existence of a more specific statute is unavailing.

B. *Motion for Acquittal of Solicitation to Commit Kidnapping*

Freeman contends the trial court should have granted her motion for acquittal of the solicitation to commit kidnapping charge because (1) both she and Oakley were entitled to immunity from culpability for the kidnapping of Freeman's own child from foster parents, and (2) there was no evidence of Freeman's intent that Oakley use force or fear.

1. *Parental Immunity from Kidnapping*

Freeman contends that she could not properly be convicted of solicitation to commit kidnapping of her own child because there was no evidence of the existence, or service on her, of a court order denying her the right to custody.

In *Wilborn v. Superior Court* (1959) 51 Cal.2d 828, 830 (*Wilborn*), the California Supreme Court noted that "'*[i]n the absence of an order or decree affecting the custody of a child*, it is generally held that a parent, or one assisting such parent, does not commit the crime of kidnapping by taking exclusive possession of the child.'" (Italics added.) After recognizing the majority view that a person assisting a parent with a kidnapping is not culpable if the parent could not be culpable, the *Wilborn* court adopted the minority rule that for policy reasons culpability should be imposed on a nonparent. (*Id*. at pp. 830-831.) The court premised its conclusion on a concern for the "mental anxiety of the parent who loses the child . . . [when] the child passes into the hands of one having no parental obligations toward the child." (*Id*. at p. 831.) The *Wilborn* court concluded that "whatever may be the right of one parent, in the absence of an order for child custody, to invade the possession of the other to take or entice away their mutual offspring, such right may not be delegated to an agent." (*Ibid*.)

We need not address Freeman's contention that the *Wilborn* rule, declining to extend parental kidnapping immunity to nonparents, should not apply to a situation where a parent solicits a nonparent to take a child from *foster* parents. Even assuming that Oakley would be immunized from culpability for kidnapping if Freeman had the right to take her child (and thus Freeman would in turn be immunized from the crime of

solicitation to commit kidnapping), the fact that at the time of the charged conduct CPS had placed E. with the foster parents created the practical equivalent of an "'order or decree affecting the custody of a child'" (*Wilborn, supra*, 51 Cal.2d at p. 830), which inhibited Freeman's parental right to take her child.

Consistent with this conclusion, the child abduction statute provides that CPS has the right to physical custody whenever it has taken protective custody "*by statutory authority* or court order." (§ 277, subd. (e), italics added; see also *People v. Ryan* (1999) 76 Cal.App.4th 1304, 1314 [general legal right to custody does not equate with right to physical custody for purposes of child abduction statute].) Regardless of the stage of the dependency proceedings or the issuance of any specific dependency court order, Freeman knew that her daughter had been removed from her physical custody and that she could not regain that custody without permission from the authorities. Accordingly, Freeman could properly be held criminally liable for her efforts to take her daughter from the foster placement without authorization. To hold otherwise would defeat the Legislature's intent to protect the welfare of children who are removed from their parents' physical custody and placed in foster care during the pendency of dependency proceedings.

Alternatively, even if we were to construe the record as failing to show Freeman had lost her custody rights, Freeman could be culpable under the rule extending kidnapping liability to a parent with custodial rights who takes his or her child for an illegal purpose. "[W]hile a [parent] entitled to custody ordinarily cannot kidnap his [or her] own child, [the parent's] right to physical custody ends when he [or she] exercises it for a purpose known to be illegal. . . . [¶] [S]uch a parent is liable for kidnapping if he or

she exercises custodial rights for an illegal purpose." (*People v. Senior* (1992) 3 Cal.App.4th 765, 781.) Because E. was in protective custody, Freeman could properly be liable for solicitation to commit kidnapping based on her illegal purpose of depriving CPS of its legal right to temporary custody of E. (See §§ 277, subd. (e) [providing that protective custody makes CPS a lawful custodian and gives CPS a right to physical custody], 278.5 [defining the crime of depriving a lawful custodian of right to custody or visitation].)

2. *Intent to Use Force or Fear*

Freeman asserts her acquittal motion brought at the close of the prosecution's case should have been granted because there was no evidence she intended that Oakley use force or fear when taking E., but only intended that Oakley persuade E. to voluntarily leave her foster parents. Oakley testified that Freeman discussed the use of an "escort" who assists with combative, uncooperative teens, and that Freeman described plans where Oakley would convince E. to approach Freeman's vehicle and Freeman would then "'take'" E. or "'take off'" with E. From Freeman's discussion of the use of an escort, the jury could reasonably infer that Freeman anticipated resistance from E. and that she was trying to devise ways to overcome that resistance. Further, the jury could reasonably interpret Freeman's references to taking E. or taking off with E. as meaning that, if necessary, Freeman intended to use force or fear to make E. enter the vehicle. Drawing these inferences, the jury could conclude that Freeman wanted Oakley to help her take E. by force or intimidation once E. was near Freeman's vehicle. There was sufficient evidence to support a finding of Freeman's intent that Oakley use force or fear.

Because there was sufficient evidence of intent to use force or fear, we need not consider whether a minor in protective custody, such as E., is incapable of giving legal consent, thus altering the requisite force or fear element for kidnapping. (See *In re Michele D.* (2002) 29 Cal.4th 600, 607-612; fn. 11, *post*.)

C. *Instruction on Consent Defense for Solicitation to Commit Kidnapping*

Freeman argues the trial court erred in refusing her request that the jury be instructed that consent is a defense to the offense of solicitation to commit kidnapping. Freeman requested that the jury be instructed in the language of CALJIC No. 1.23, which explains that consent means a person acts freely and voluntarily and not under the influence of threats, force or duress, with knowledge of the true nature of the act, and with the mental capacity to make an intelligent choice. (See also CALJIC No. 9.56, defining consent defense for kidnapping.) Rejecting the requested instruction, the trial court found that E. was not capable of consenting.

The crime of kidnapping is not committed when a person voluntarily consents to accompany the defendant. (*People v. Davis* (1995) 10 Cal.4th 463, 516-517.) It follows that if there is evidence that the defendant engaged in solicitation activity but did not intend that the alleged victim be taken unless he or she consented, the defendant could properly present a consent defense to a solicitation to commit kidnapping charge. Here, however, a standard consent instruction might have been inappropriate because arguably

E. did not have the capacity to give legal consent given that she was a minor in protective foster placement.[11]

We need not decide the issue of whether E. could legally consent because, assuming arguendo she could give consent, the jury was adequately apprised of this concept. Conviction of kidnapping "requires proof that the perpetrator committed the criminal act[] against the will of the victim; i.e., without the victim's consent." (*People v. Hill* (2000) 23 Cal.4th 853, 855; see also *People v. Majors* (2004) 33 Cal.4th 321, 331 ["concepts of consent and force or fear with regard to kidnapping are inextricably intertwined"].) In accord with this principle, the jury was instructed that the crime of kidnapping requires that the "movement of the other person was without his or her consent." Thus, the jury was explicitly told that kidnapping requires lack of consent. From this instruction, the jurors would have understood that if they believed Freeman did not intend that Oakley take E. unless E. consented, Freeman did not solicit with the intent that kidnapping be committed.

Freeman has not identified any matter potentially beneficial to the defense that was not explained to the jury because of the trial court's failure to elaborate on the concept of consent. Even assuming instructional error, there is no reasonable probability the outcome would have been more favorable to Freeman absent the error. (*People v.*

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11 If a person is incapable of giving legal consent, kidnapping does not require force beyond what is necessary to move the person, but in the absence of such force or fear the record must show the defendant acted for an illegal purpose or with an illegal intent. (*In re Michele D., supra,* 29 Cal.4th at pp. 607-612.)

Friend, supra, 47 Cal.4th at pp. 42-43; *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089.)

IV. *Admission of E.'s Pretrial Statements Regarding Abuse*

Prior to trial, the prosecutor was aware that E. intended to recant her accusations of abuse by her mother; accordingly, the prosecution did not call her as a witness. However, the defense called E. to testify on Freeman's behalf. As expected, E. largely recanted her pretrial accusations, testifying that the abuse did not occur or she did not remember it happening and suggesting she made the accusations because she was depressed and had hallucinated.

To support the child endangerment and battery charges, in its case-in-chief the prosecution introduced E.'s pretrial statements during the 911 call and to Deputy Barone under the spontaneous declaration exception to the hearsay rule. Freeman argues the trial court abused its discretion in admitting E.'s statements under this hearsay exception.

A spontaneous statement admissible under Evidence Code section 1240 is a statement made without deliberation or reflection. (*People v. Raley* (1992) 2 Cal.4th 870, 892.) The requirements to trigger this exception to the hearsay rule are: (1) an event has occurred startling enough to produce nervous excitement and render the statement spontaneous and unreflecting, (2) the statement was made before there has been time to contrive and misrepresent, i.e., while the nervous excitement dominates and reflective powers remain in abeyance, and (3) the statement relates to the circumstances of the startling event. (*People v. Poggi* (1988) 45 Cal.3d 306, 318.)

The basis for the trustworthiness of spontaneous declarations "'"is that in the stress of nervous excitement, the reflective faculties may be stilled and the utterance may become the unreflecting and sincere expression of one's actual impressions and belief."'" (*People v. Poggi, supra,* 45 Cal.3d at p. 318.) "When the statements in question were made and whether they were delivered directly or in response to a question are important factors to be considered on the issue of spontaneity." (*Id.* at p. 319.) However, "'[t]he crucial element in determining whether a declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is . . . the mental state of the speaker. The nature of the utterance—how long it was made after the startling incident and whether the speaker blurted it out, for example—may be important, but solely as an indicator of the mental state of the declarant.'" (*People v. Raley, supra,* 2 Cal.4th at pp. 892-893.) "'[N]either lapse of time between the event and the declarations nor the fact that the declarations were elicited by questioning deprives the statements of spontaneity if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance.'" (*Id*. at p. 893.)

On appeal, we review the trial court's ruling under the abuse of discretion standard. (*People v. Raley, supra,* 2 Cal.4th at p. 894.)

The record shows that when E. called 911 she was crying, and when Deputy Barone interviewed her about an hour later, she appeared terrified, her voice was cracking, and her hands were shaking. Based on this evidence showing that E. was distraught when she made the 911 call, and that she was still distraught when she spoke to Deputy Barone, the trial court could reasonably conclude that E. was operating under

the stress of the incident with her mother and that she had not yet begun to deliberate or reflect when she made the statements.

We are not persuaded by Freeman's contention that the events were not significantly startling so as to suspend E.'s powers of reflection. E.'s reports that her mother screamed at her and pushed, hit and kicked her are sufficient to generate a stressed, emotional response. (See, e.g., *People v. Gallego* (1990) 52 Cal.3d 115, 175 [swearing at and slapping of declarant created startling event].)

Freeman also argues that E. had time to deliberate because she called her aunt before calling 911 and did not speak to Deputy Barone until after an additional hour's time had elapsed. E.'s aunt testified that E. called her about four or five times over a 20- to 25-minute period of time, sounding "[v]ery frightened" and "unlike [the aunt had] ever heard her before," which prompted the aunt to suggest that E. call the police. When Deputy Barone arrived at E.'s residence about one hour after the 911 call, E. was still extremely upset. Given the evidence showing E. was continuing to experience a high level of stress during the 30- to 90-minute time period after the altercation with her mother, the trial court was not required to find E.'s stress had abated sufficiently to allow her to meaningfully reflect. We are also not persuaded by Freeman's contention that the fact that E. called her aunt showed deliberation. An upset minor's conduct of repeatedly calling a close adult relative supports that the minor was feeling a substantial amount of stress which suspended reflective powers.

Freeman contends that E.'s statements during the 911 call did not sufficiently relate to the startling event to warrant application of the spontaneous statement exception.

To support this assertion, she posits that E. did not refer to the incidents occurring on September 10 until the end of the phone call. The transcript of the 911 tape shows that at the inception of the call, E. told the 911 dispatcher that her mother was "really kinda violent and she'll hit me and . . . punch me . . . throw me against walls . . . ." This statement is consistent with the events occurring on September 10 that E. later described in more detail. The fact that E. then provided other information, including her address, name, age, and her general background in response to the dispatcher's questions does not show the 911 statements were not sufficiently related to the startling event.

Alternatively, any error in admitting E.'s statements under the spontaneous declaration exception was not prejudicial because the statements were admissible as prior inconsistent statements. (Evid. Code, § 1235; *People v. Johnson* (1992) 3 Cal.4th 1183, 1219-1220.) As stated, in her trial testimony E. largely recanted and denied the occurrence or her recollection of the abuse. During pretrial discussions, the trial court stated it would admit E.'s prior statements describing the abuse under the prior inconsistent statement exception if E. testified and denied the abuse.[12] The propriety of admitting E.'s prior statements is also supported by the indicia of reliability arising from the physical evidence of abuse (including welts, bruises, and scratches) observed by Deputy Barone and the examining nurse practitioner. Even if the statements should not have been admitted under the spontaneous statement exception, because they were

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12 If the trial court had ruled E.'s pretrial statements were inadmissible under the spontaneous declaration exception, the prosecutor could have called E. during its case-in-chief and, upon her recantation, introduced her pretrial statements to the 911 operator and Deputy Barone.

admissible as prior inconsistent statements it is not reasonably probable the outcome would have been more favorable to Freeman absent the error. (*People v. Johnson*, *supra*, 3 Cal.4th at p. 1220.)

V. *Claim of Ineffective Representation on Appeal*

After the appellate briefing in this case was completed, Freeman filed an in pro. per. petition for writ of habeas corpus alleging that appellate counsel incompetently argued the judicial bias issue on appeal.

To demonstrate ineffective representation, the defendant must establish (1) that counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability that, but for counsel's errors, the result would have been more favorable to the defendant. (*In re Alvernaz* (1992) 2 Cal.4th 924, 936-937.) If the defendant does not carry his or her burden to show prejudice, a court may reject the incompetency claim without determining whether counsel's performance was deficient. (*Id*. at p. 945.)

Freeman asserts her appellate counsel was ineffective because he failed to raise the issue that the entire San Diego County Superior Court bench had been recused from her case. The facts underlying the "recusal" of the entire San Diego County bench are set forth in the California Supreme Court's opinion in this case (*People v. Freeman, supra,*

47 Cal.4th at pp. 997-999), and we need not reiterate them in any detail here.[13] Briefly, Judge Robert O'Neill and the entire San Diego County Superior Court bench were originally recused because of allegations that Freeman had stalked a San Diego County Superior Court judge who was Judge O'Neill's friend. After these stalking allegations were assessed to be unfounded, Judge O'Neill was reassigned to the case and presided over the trial. (*Id*. at pp. 997-998.)

On review before the California Supreme Court, the court held that Freeman had forfeited a statutory judicial disqualification claim by failing to utilize the required writ procedure, and that Judge O'Neill's reassignment to the case did not violate the constitutional judicial bias standards. (*People v. Freeman, supra*, 47 Cal.4th at pp. 999-1000, 1006.) Because the recusal of the entire bench was premised on the same grounds as Judge O'Neill's recusal, it follows that there is no viable statutory or constitutional argument premised on recusal of the entire bench. Accordingly, Freeman's claim of ineffective representation is unavailing. We summarily deny the writ petition raising this claim. (*People v. Duvall* (1995) 9 Cal.4th 464, 475 [summary denial of writ petition proper when petition fails to state prima facie case for relief]).)

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13 Although we know of no procedure that allows an entire bench to be recused en masse as opposed to individual recusal by each judge, we recognize that such a broad recusal may be the practical effect of a decision by a presiding or supervising judge to assign the case to a retired or out-of-county judge.

DISPOSITION

The judgment is affirmed. The petition for writ of habeas corpus is denied.

HALLER, Acting P. J.

WE CONCUR:

MCDONALD, J.

O'ROURKE, J.